Sun Electric Corporation *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local No. 1712. Case 33-CA-5185

January 19, 1983

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS ZIMMERMAN AND HUNTER

On April 28, 1982, Administrative Law Judge Stanley N. Ohlbaum issued the attached Decision in this proceeding. Thereafter, counsel for the General Counsel and the Charging Party filed exceptions and supporting briefs. Subsequently, Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The Charging Party has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The Charging Party contends that the Administrative Law Judge's interpretation of the evidence and his credibility findings showed bias and prejudice. Upon careful examination of the Administrative Law Judge's Decision and the entire record, we are satisfied that the contentions of the Charging Party in this regard are without merit.

In adopting the Administrative Law Judge's Decision we disavow any reliance on his comments contained in fn. 36.

DECISION

I. PRELIMINARY STATEMENT; ISSUES

STANLEY N. OHLBAUM, Administrative Law Judge: This proceeding[1] under the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* (hereinafter called the Act), was heard before me in Chicago, Illinois, on various dates from September 2 through November 14, 1981, with all parties participating throughout by counsel and given full opportunity to present evidence and arguments. After 11 days of hearing, 1,058 transcript pages, and some 1,125 pages of exhibits and numerous motions requiring detailed interlocutory orders, at the conclusion of the General Counsel's/Charging Party Union's case Respondent moved to dismiss the complaint. In view of the importance of the issues tendered, all parties requested time for submission of briefs, an additional 254 pages received by December 23, 1981[2]—for a total record of around 2,500 pages.

The issues presented are whether, in violation of Section 8(a)(5) and (1) of the Act, Respondent Employer has since on or about September 30, 1981, failed and refused to engage in good-faith bargaining with Charging Party Union on the subject of pension plans; and whether, in that event, a strike by a collective-bargaining unit of Respondent's employees represented by Charging Party, commencing on November 17, 1980, was an unfair labor practice strike. A further issue, raised by amendment to the complaint, is whether Respondent also violated Section 8(a)(3) of the Act by refusing to accept Charging Party Union's alleged unconditional offer to return the striking unit employees to work.

Upon the entire record and my observation of the testimonial demeanor of the witnesses,[3] I make the following:

FINDINGS AND CONCLUSIONS

II. JURISDICTION

At all materials times, Respondent has been and is an Illinois corporation, with office and place of business in Crystal Lake, Illinois, the facility here involved, engaged in manufacture and sale of automotive diagnostic equipment. During the representative year immediately preceding issuance of the complaint, Respondent sold and shipped from that facility, to places outside Illinois, finished products valued at over $50,000; and also, during the same period in the course and conduct of its business at that facility, purchased and took delivery there, directly in interstate commerce from outside Illinois, of products valued at over $50,000.

I find that at all material times Respondent has been and is an employer within the meaning of Section 2(2), (6), and (7) of the Act; and that at all of those times the Charging Party Union (hereinafter called the UAW) has been and is a labor organization as defined by Section 2(5) of the Act.

[1] Based upon complaint issued on July 23, 1981, by the Board's Acting Regional Director for its Region 33, growing out of a charge dated December 11 and filed December 15, 1980, by the Charging Party Union following withdrawal on December 4 of a previous charge (C.P. Exh. 6) filed by the same Charging Party on November 20, 1980.

[2] On January 4, 1982, there was received from counsel for Charging Party a letter dated December 28, 1981, in the nature of reply to Respondent's brief. By motion dated December 31, 1981, received on January 5, 1982, Respondent moved to strike the foregoing letter from the record as unauthorized, and renewed its motion to dismiss the complaint. In the exercise of discretion, Respondent's motion to strike out Charging Party counsel's letter is denied. The foregoing documents have been incorporated into the record as Judge's Exhs. 1 and 2.

[3] For practical purposes, including Respondent's motion to dismiss, no determinative credibility issues are presented.

III. ALLEGED UNFAIR LABOR PRACTICES

Facts as Found; Pleadings

The complaint (par. 7) alleges and the answer denies that Respondent Employer violated Section 8(a)(5) and (1) of the Act in that since on or about September 30, 1981, it has failed and refused "in a timely fashion, thoroughly to consider and specifically to respond to proposals made by the Union regarding pension plans" and that, in consequence thereof, a strike incepting on November 17, 1980, was an unfair labor practice strike.

September 3, 1981, amendments to the complaint allege additionally that, notwithstanding the Union's July 27, 1981, notification that the strike was ended and offering unconditionally to return to work, Respondent refused to reinstate striking employees upon the alleged ground that they were economic and not unfair labor practice strikers, thereby violating Section 8(a)(3) of the Act. Respondent's supplemental answer of September 4, 1981, admits receipt of the Union's offer but denies it was unconditional as required, and admits that it refused to reemploy the strikers on the ground that they were economic and not unfair labor practice strikers.

IV. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts as Found*

1. Chief persons involved

The following are the major names figuring in events to be described:

Aetna Life & Casualty (Aetna): Respondent Employer's insurance carrier/fiduciary of its employees' pension plan.

A. S. Hansen, Inc. (Hansen): Respondent Employer's adviser/actuary for its employees' pension plan.

Roy Dahlke: Charging Party Union's International representative for 32 years, serving Respondent Employer's bargaining unit employees (involving labor agreement negotiation and grievance administration) from 1976 to January 1981—including the 1980 labor agreement negotiations here concerned.[4]

Keith Engelhardt: Respondent Employer's bargaining unit employee and, since 1979, union bargaining committee member.

Paul Korman: Charging Party Union's International representative for 14 years (involving labor agreement negotiation and grievance administration); has represented Respondent's unit employees at various times, including 1971 (when he negotiated the Union's first labor agreement with Respondent) and 1974, and since January 1981.

Peter Tom Shukas: Respondent Employer's director of personnel.

Henry A. Stark: Respondent Employer's vice president for Legal and Human Resources since about 1979, and its chief negotiator in the 1980 labor agreement negotiations here involved.

Linda Tobin Trieb: Respondent's bargaining unit employee and Charging Party Union member; as of the date of her testimony here, not at work for Respondent since the unit employees' strike incepting in November 1980.

Bruce Watson: Charging Party Union member and official (job developer) since October 1, 1978; on leave of absence from employment in bargaining unit here.

2. General background

Respondent, a manufacturer of automotive diagnostic equipment with some 65 operating facilities and 2,500 employees nationwide, maintains a plant in Crystal Lake, Illinois, the facility here involved, where a production and maintenance collective-bargaining unit of about 300–350 of its employees has been represented by Charging Party Union, since its certification on May 17, 1971, under successive 3-year labor agreements, the latest from November 17, 1977, to November 17, 1980. One feature of those labor contracts is a company-sponsored retirement pension plan.[5] It is Respondent's retirement pension plan around which the controversy here swirls.

3. Chronology

Credited proof, largely uncontroverted in essential substance, establishes as follows:

(a) *1977*

The parties' 1977–80 labor agreement contained the provision (Resp. Exh. 12, p. 34):

> Section 12.2—Pension Benefits—Company shall at its expense continue in force its policy of insurance to provide eligible employees the present retirement benefits available to them in conformity with state and federal laws.

In connection with their 1977–80 labor agreement (Resp. Exh. 12), the parties on November 18, 1977, executed, and the union unit membership subsequently ratified, a "Memorandum of Understanding" which provided, in relevant part (G.C. Exh. 2a):

> The parties agree to consider changes to the Pension Plan at the termination of the Agreement in November 1980. The Union agrees to notify the Company of desired changes twelve (12) months prior to the expiration of the 1980 Contract and Company agrees that any changes negotiated at that time will retroactively effect [sic] any employee

[4] As senior negotiator of 28 or 29 International representatives of the Union's "Region 4" (covering Illinois, Iowa, and Nebraska), Dahlke has negotiated around 100 labor agreements, chiefly for Illinois bargaining units, in various industries covering some 40 employers.

[5] In fact, Respondent has maintained a retirement pension plan for its employees since 1958. According to uncontroverted testimony of Respondent's director of personnel, Shukas, Respondent made annual distribution of copies of the plan to its participants.

who retires or first receives benefit payments during the term of this new Agreement.[6]

(b) *1979*

On July 23, 1979, union negotiator Dahlke wrote Respondent, referring to the parties' aforequoted November 18, 1977, "Memorandum of Understanding" (Resp. Exh. 12):

> In the last Contract Negotiations between your Company and UAW Local 1712, the Company gave to the Union a letter on the matter of the Pension Plan.
>
> The intent of the letter was while not precluding any Pension Proposals the Union might make in the 1980 negotiations, the Company would meet with the Union in 1979 to hear from the Union proposals for changes in the Pension Plan which the Company would study and review.
>
> May I hear from you as to your intentions in this matter. [G.C. Exh. 3.]

Respondent's July 25, 1979, answer to the foregoing was (G.C. Exh. 4):

> In reference to your letter of July 23, 1979 regarding Pension Proposals, please be advised that any such requests should be directed to my attention.
>
> Upon receipt of your written proposal, I will forward said proposal on to the Sun [i.e., Respondent's] Pension Committee for study and review.

Respondent has meanwhile since 1978–79 been reviewing, and has entered into discussion concerning, the Company's employees' retirement pension system, looking at possible modification,[7] with its pension plan adviser/actuary Hansen.[8]

Responding to the Company's July 25, 1979, letter (G.C. Exh. 4) soliciting the Union's specific proposals concerning pensions, the Union on August 6, 1979, supplied the Company with a list of 16 "proposals" (G.C. Exh. 6), stating, *inter alia*, by preamble:

> As you know, Pension Plans by their very nature are most complex. We will set forth several proposals which reflect the thinking of the Union Membership and the Union Committee.
>
> The final decision as to what our proposals might ultimately be rests with the Membership of UAW Local 1712.
>
> The following proposals are intended to allow your Company a great deal of time for study of our position, but the Union, of course, reserves the final right to determine what our Pension Proposals might be in the 1980 negotiations between your Company and our Union.
>
> With the very clear understanding that this does not preclude the Union from any Pension Proposal it might make in 1980, the following are some of the major points that need correction as soon as possible: [There follows the 16 tentative "major points."]

As to the 16 tentative "major points" which follow, it is noted that some of them are no more definite than "the exact details can be discussed in negotiations," "rewrite . . . so that it is more easily understood," "Discuss," and "Negotiate."

On the heels of this proposal, on September 20, 1979, the Union wrote Respondent on a number of subjects, including what appears to be a substantial and potentially actuarially costly "amend[ment]" to its foregoing April 6 pension proposals (G.C. Exh. 6).

On cross-examination, Charging Party Union's representative and chief negotiator Dahlke conceded that the foregoing pension proposals to the Company were intended, for the Union as well as the Company, only as bargaining points or topics for the 1980 negotiations—with the Union itself at liberty to alter, withdraw, or add to its own earlier proposals.[9] Dahlke further conceded that at no time following his submission to Respondent of his August 6, 1979, pension proposals (G.C. Exh. 6) did he, prior to the inception of the September 30, 1980, negotiations, seek to meet with Respondent to discuss those proposals.[10]

The Union's pension proposals[11] were referred by the Company to its pension plan adviser/actuary Hansen for study, with no discussion thereon prior to inception of the 1980–83 labor contract negotiations in September 1980.

(c) *1980*

Unit employees' suggestions, solicited by their negotiating committee for their hoped-for 1980–83 labor contract, cover a wide spectrum of subjects (e.g., Resp. Exhs. 30–1 through 30–81), including retirement pension improvements.[12]

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[6] According to union negotiator Dahlke, the Company indicated at these 1977 negotiations that the subject of retirement pensions was not ripe for negotiation since it was then under study by the pension insurer/administrator Aetna.

[7] Credited testimony of Respondent's vice president, Stark. See also C.P. Exhs. 10 and 11.

[8] Also in 1979-80, Respondent was constrained to conform its pension plan to statutory/regulatory requirements mandated by January 1, 1979—effective amendments to the Age Discrimination in Employment Act ("ADEA"/"ERISA"). This is discussed in section B, *infra*.

[9] That this is true is fortified by the format of the Union's proposals themselves, which, as shown above, expressly contemplated discussion, clarification, and negotiation.

[10] Nor, in my estimation, was Respondent under obligation to do so, under its November 18, 1977, "Memorandum of Understanding" (G.C. Exh. 2a). See section B, *infra*. Indeed, the General Counsel and Charging Party Union expressly conceded at the hearing that Respondent was under no obligation to bargain concerning pensions prior to the September 30, 1980, contract reopener negotiations.

[11] With the exception of union proposal "16" (G.C. Exh. 6), calling for "Cost-of-living raises for people who retire under the Pension Plan," which the Company regarded as purely economic for its decision.

[12] According to testimony of the General Counsel's witness, Keith Engelhardt, a unit bargaining committeeman, union chief negotiator Dahlke was endeavoring, among other things, to improve the pension plan for *employees who had already retired*. In this regard, however, see *Allied Chemical & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). It is unclear whether concern over pensions of *retired* employees, as distinguished from unretired unit em-

Continued

At the first negotiating session on a 1980–83 labor contract, which took place on September 30, 1980, the Union presented its proposals (G.C. Exh. 7), covering a full range of subjects. The only reference to pensions therein is "Section 12.2—Letter to Company of 8-6-79" (*supra*, G.C. Exh. 6), which union chief negotiator Dahlke indicated at that meeting (September 30, 1980) he wished to discuss.

The following is a chronology of the formal bargaining sessions, with related written proposals, between the parties, in their attempts to negotiate a 1980–83 labor contract:

Meeting Number	*Date*	*Document Distributed and Nature*	
1	9-30-80	*GC Exh. 7:*	Union proposals
2	10-15-80	*Resp. Exh. 1:*	Company proposals
3	10-23-80	*Resp. Exh. 3:*	Union proposals
		Resp. Exh. 2:	Company proposals
4	10-29-80	*Resp. Exh. 4:*	Company proposals
		Resp. Exh. 5:	Company proposals
5	11-5-80	*Resp. Exh. 8B:*	Company proposal
		Resp. Exh. 6:	Company proposals (re layoffs only)
6	11-7-80	*Resp. Exh. 7:*	Company proposals
7	11-12-80	*Resp. Exh. 8:*	Company proposals
		Resp. Exh. 9:	Company proposals (re job classifications and educational assistance program)
8	11-14-80	*Resp. Exh. 10B:*	Company proposals
		Resp. Exh. 19:	Company proposals
9	12-10-80	*Resp. Exh. 33:*	Company proposals
10	12-12-80	*Resp. Exh. 34:*	Company proposals
11	1-23-81	*Resp. Exh. 35:*	Company proposals
12	2-16-81	*Resp. Exh. 35A:*	Union proposals
13	3-10-81	*Resp. Exh. 36:*	Company proposals
14	3-20-81	*Resp. Exh. 37:*	Company proposals
15	6-25-81	*GC Exh. 14A:*	Company proposals
16	6-26-81	*GC Exh. 15:*	Union proposals
17	7-31-81	*Resp. Exh. 38:*	Company proposals

Negotiations continued thereafter also; indeed, to and during the hearing, with no assertion that either party has refused to meet for further bargaining. The bargaining sessions generally followed the usual pattern of discussion, explanation, proposed changes, and acquiescence in or modification of items or topics *seriatim*, with subjects bargained off or modified, against each other or against counterproposals; with new or modified proposals injected in subsequent negotiating sessions. The testimony, as well as the written proposals exchanged, reflect the typical, albeit perhaps slow, peristalsis of collective bargaining looking toward a labor contract. Included was the subject of pensions, with, for example, the Company making a written proposal to the Union on that subject at the session of November 5, 1980 (G.C. Exh. 8B), continuing the pension plan, subject to company modification, with Company's chief negotiator, Stark, indicating during the contract discussions that the Company was "in the process of reviewing the pension plan to determine what adjustments or changes might be made"—eliciting union chief negotiator Dahlke's displeasure and reminder that the Company had had the Union's proposals (such as they were) for 15 months. Nevertheless, there is no evidence that the Union made any counterproposals on this subject. The subject of pensions next came up at the negotiating session of November 12, 1980, when Stark indicated there remained "much actuarial work . . . to be done . . . and considerable review and consideration . . . ." Dahlke, without further ado, took the position that this constituted "an unfair labor practice" which he would charge before the National Labor Relations Board. When Stark reminded Dahlke that the Company's pension plan was countrywide, affecting employees throughout the country (as stated above, Respondent maintains some 65 locations with around 2,500 employees), Dahlke stated that his interest was limited to the Company's Crystal Lake unit employees.

It was not until the negotiating session of November 12 that the Company was apprised that—notwithstanding the carefully precautionary and open-ended language of the Union's earlier pension proposals (including its own explicit indication therein that further discussion and negotiation were required—see G.C. Exh. 6)—the Union's earlier "16 points" were firm, at least for discussion purposes. Thereupon, at the afternoon negotiating session on that day (November 12), the Union's "16 point" pension proposal (G.C. Exh. 6) was discussed, with the Company agreeing to various portions thereof in whole (e.g., "6") or in part (e.g., "7"), with various other portions left open ("13") or unresolved pending further necessary study ("14" and "15").[13] But, to allay Dahlke's expressed fear (according to his testimony) that under the Company's pension proposal of November 5 (G.C. Exh. 8A, sec. 12.2) employees' pension benefits might be *reduced*, Stark assured him orally that this would not occur, explicitly confirming that assurance in writing on November 14 (G.C. Exhs. 10A and 10B, p. 14, sec. 12.2). It is emphasized that the parties' November 12 negotiating sessions encompassed a wide spectrum of economic subjects, of which pensions was only one and on none of which was further discussion foreclosed.[14] Dahlke con-

ployees, formed part of the basis for the unit employees' strike here. If it did, since that subject is not mandatorily bargainable, an ensuing strike for failure to bargain thereon would be unprotected and not an unfair labor practice strike. *Id.* In view of the disposition here made, it is unnecessary to reach this issue.

[13] One basis therefor was, as indicated by the Company, the necessity for "costing-out" these aspects in their ultimately bargained form *vis-a-vis* , other economic issues on the bargaining table for consideration—the wholly normal basic pattern of collective bargaining (see, e.g., G.C. Exh. 37, *passim*). Thus, for example, Union Chief Negotiator Dahlke testified that the Company never took the position that its initial proposed wage schedule (Resp. Exh. 9) was final. Nor could or did the Union insist that its pension proposals—indefinite as some of them expressly were (G.C. Exh. 6)—were final and inflexible. As everybody who has engaged in collective bargaining knows, items and proposals on different subjects are continuously traded off against each other before final agreement, that being the very essence of the collective-bargaining process.

[14] See fn. 13, *supra*.

cedes that with regard to at least one important subject, training, the Company's proposal of November 12 (G.C. Exh. 8, sec. 14.14) met the Union's previous objections.

Union chief negotiator Dahlke conceded on cross-examination that during the 1980 negotiations the Union's response to the Company's proposals were all oral, with the sole exception of the Union's proposals of October 23, 1980 (Resp. Exh. 3), which constituted the *only* written counterproposals put forward by the Union in 1980. At no time between the Company's concessions on November 12 concerning items of the Union's pension proposals and the end of December 1980 did the Union make any counterproposals concerning pensions.

Within the context of the above negotiating sessions and during their progression, it is stipulated that on November 2 a strike vote meeting was held[15] and on that date as well as on November 16 a strike was authorized by the unit members. Notwithstanding the fact that the parties had not arrived at agreement when their 1977–80 agreement expired on November 17, 1980, the further fact that the parties were still in the process of actively ongoing negotiation at that time, and the additional fact that chief company negotiator Stark assured chief union negotiator Dahlke on November 12 that there would be no lockout (Dahlke's testimony) if agreement were not reached, Dahlke (according to his own testimony) on the same occasion informed Stark that only if the parties were "close" to agreement would the Union consider extending the agreement beyond its term.

The next negotiating session took place 2 days later, on November 14, 1980, with, again, the Company taking the initiative through yet another written proposal (G.C. Exh. 10B), containing still further proposed betterments of its training program, as to which union chief negotiator Dahlke, according to his own testimony, took the position—without modifying his original objectives or demands—that further negotiation was required. Also as to overtime, Dahlke suggested that "additional negotiations and exploration of proposals" were essential. According to Dahlke, there was give and take on both sides of this session (November 14), the Company increasing its proposed betterments as the negotiations progressed. Generally with regard to the Company's concededly improved written proposals of November 14, Dahlke took the position that the proposals were so complex and "mammoth" that they required further study, discussion, and negotiations—in Dahlke's words, "a great deal of time and further discussion . . . it could have been days or weeks." On the subject of pensions, according to Stark, whose testimony I credit, Dahlke indicated at the same (November 14) meeting that the pension plan indeed required actuarial studies and further discussion over a period of 6 months.

According to Dahlke, on November 14, 1980, Stark rejected the Union's offer for a 3-1/2 year or a 6-month extension of the existing contract;[16] according to Stark, he (Stark) proposed an extension from meeting to meeting provided progress was being made. At this time, according to Dahlke, the parties had not arrived at agreement on a seemingly large number of important subjects in addition to pensions—*viz*, grievance procedure, overtime, holidays, vacation pay computation, seniority (especially on layoff), insurance, leave of absence, jury duty, and meal periods; according to unit bargaining committeeman Engelhardt, there were some 13 items under negotiation at the end of the November 14 session, with contract duration proposed for the first time by the Union on that date.[17]

In this posture of the ongoing bargaining negotiations, without further discussion and without indication that the Company would not negotiate further, the unit employees, following a meeting of November 16,[18] went out on strike on November 17, 1980, with, thereafter, only two (G.C. Exh. 23 and Resp. Exh. 32m) of many picket signs claiming an "unfair labor practice" and only one (G.C. Exh. 23) of those alleging refusal to bargain concerning pensions.

Nothwithstanding the strike (and Respondent's hiring of replacements for the striking employees—whom it regarded as economic strikers—to keep its plant in operation[19]), the parties nevertheless continued their negotiations, as indicated by the above chronology, to and through the instant hearing, with written proposals and counterproposals being traded, without counterproposal or renewal of bargaining by the Union on the subject of pensions other than that, according to Dahlke, he told the Company at a November 24 session that, in a context of many subjects remaining open for discussion, the Union was flexible on the impact of these on "fringes" including pensions. On June 25, 1981, the Company notified the Union that it was placing into effect for its nonbargaining unit personnel throughout the country a comprehensive new pension plan, which it offered to institute also for its bargaining unit personnel retroactively to July 1, 1981 (G.C. Exh. 14A).[20] It is of interest to observe that the Union's response of June 26, 1981 (G.C. Exh. 15), acknowledging receipt of the Company's new proposal on pensions, states in part:[21]

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[15] It is to be observed that the strike authorization of *November 2* occurred *prior* to the negotiating session of *November 12* when pensions were first explored, with Dahlke then for the first time indicating that he regarded Respondent's position (*November 12*) as an unfair labor practice.

[16] This would, of course, have involved no change in the existing (1977–80 collective agreement) retirement pension provision; and, under art. XVI of the then subsisting collective agreement (Resp. Exh. 12, p. 42), the terms and conditions thereof would have been (and were) projected forward beyond its November 17, 1980, termination date.

[17] Although Stark's November 14, 1980, bargaining session notes state that the parties arrived at "a bargaining impasse" (G.C. Exh. 38, p. 6) at 7:25 p.m. on that day, that seems hardly likely (unless he meant a temporary impasse at that juncture) in view of what actually took place then and the resumed bargaining which took place soon thereafter.

[18] General Counsel witness Linda Trieb testified and reiterated that, after the unit membership strike vote of November 16, Dahlke informed the membership that he intended to return to the Company to resume bargaining in order to "get something more for [the employees]."

[19] Apparently there was a plentitude of readily available local manpower to replace the striking employees.

[20] This, of course, did not preclude the Union from counterproposing that the plan, if otherwise acceptable or as modified by agreement, be retroactive to some other stipulated date (cf., e.g., parties' November 17, 1977, "Memorandum of Agreement," handwritten addendum page "W").

[21] Dahlke had meanwhile been replaced by Union International Representative Korman, who wrote the letter containing the language which follows.

> The plan will be sent to [Union headquarters in] Detroit for review and analysis by our Actuaries.
>
> I believe that you are aware of the consistent position of the Union regarding pensions being subject to the collective bargaining process. The Union reserves the right to bargain collectively over the subject of pensions and it would, therefore, be incorrect to assume that we have no objections to bargaining unit personnel participating in the pension plan retroactive to July 1, 1981.
>
> Please be advised that as soon as our Actuaries review the amended version of the Pension Plan we will be available to negotiate with the Company the subject of pensions at the bargaining table.
>
> We will also be comparing the Union's letter of August, 1979 [i.e., G.C. Exh. 6] sent by Mr. Dahlke to see which items have been addressed.

There is no indication that as of the time of the instant hearing—through November 1981—the Union had responded substantially or made any counterproposal to the Company's foregoing revised pension plan proposal. According to General Counsel witness Keith Engelhardt, a bargaining unit committeeman who attended all of the 1980-81 negotiating sessions, even as late as November 14, 1980—the last negotiating session before the strike commencing on November 17, 1980—before it had even received the Company's comprehensive pension plan revision, the Union indicated to the Company that it considered the subject of pensions so complicated that it wished to negotiate that subject further over a suggested period of 3-1/2 more months, and at no time did the Company decline to do so.

(d) *1981*

As has been pointed out, notwithstanding the strike which started on November 17, 1980, the parties continued their formal negotiations, including the subject of pensions, throughout 1981, with numerous formal contract proposals.[22] Since there is no indication that, as of the date of the instant hearing, the Union had responded by acceptance, refusal, or counterproposal, to Respondent's comprehensive new pension plan proposal of June 25, 1981 (G.C. Exh. 14A), the "old" pension plan continues to remain in effect for the unit employees.

As a feature or incident of the continuing economic struggle between the Union and Respondent commencing around February 21, 1981, the Union has been urging its members, as well as other union adherents, to engage in a nationwide consumer boycott of Respondent and its products. On July 27, 1981, the Union wrote to Respondent that the strike was over and that the striking unit employees offered "unconditional[ly]" to return to work on July 28, 1981.[23] Respondent contends that, in view of the Union-led continuing boycott of its products, that offer to return to work was not a valid unconditional work-return offer.[24]

B. *Discussion and Resolution*

It is not alleged (nor would the proof support a finding) that Respondent has engaged in a general course of failure or refusal to bargain, or in a general pattern of bad-faith bargaining, violative of the Act, but only that it has failed and refused "in a timely fashion, thoroughly to consider and specifically to respond to proposals made by the Union regarding pension plans" (complaint par. "7[a]"). Since this is the threshold as well as the basic issue to be resolved, our discussion is initially confined thereto.

The proof does not support a finding that Respondent has failed or refused to bargain with the Union concerning unit employees' pensions, or that its negotiations on that subject have been conducted in bad faith.

Although the Union furnished Respondent with a list of 16 pension "proposals" which it hoped to achieve, those proposals were preceded by a carefully worded prologue characterizing them as tentative, incomplete, and subject to withdrawal, change, or supplementation by the Union itself. Some of the proposals were expressly listed as mere topics or listings requiring elucidation, discussion, or negotiation. Furthermore, the General Counsel and Charging Party Union concede that Respondent was under no obligation to negotiate concerning any of them, or on the subject of pensions, until the 1980 contract reopener negotiations commencing on September 30, 1980. The critical period during which Respondent's bargaining conduct must be assessed is thus limited to the relatively brief time from the outset of negotiations on September 30, 1980, until the Union commenced its strike on November 17, 1980, characterized in the complaint as an unfair labor practice strike caused by Respondent's failure and refusal to bargain as required by the Act on the subject of pensions.

Although pensions are a mandatory subject of collective bargaining under the Act,[25] the Act does not require that parties who bargain must agree—it explicitly states that they need not;[26] its command is only that they bargain without mind set against agreement or the notion of compromise.[27] Nor does the Act require that

[22] Respondent's version of the history of the parties' dealings to the time of the Regional Director's acceptance of a settlement agreement of the instant proceeding, on February 18, 1981, between Respondent and the General Counsel, over Charging Party's opposition, is reflected in Respondent's counsel's May 8, 1981, letter to the General Counsel's Office of Appeals (G.C. Exh. 39B).

[23] Union International Representative Korman testified that around 250 of them tendered themselves for work on the morning of July 28, 1981.

[24] This question is dealt with in sec. B, *infra*.

[25] *Inland Steel Company*, 77 NLRB 1, enfd. 170 F.2d 247 (7th Cir. 1948), cert. denied 336 U.S. 960 (1949); Note, *Pension and Retirement Matters—a Subject of Compulsory Collective Bargaining*, 43 Ill. L. Rev. 713 (1948).

[26] NLRA, Sec. 8(d).

[27] Cf. *N.L.R.B.* v. *Truitt Manufacturing Co.*, 351 U.S. 149, 152-153 (1956); *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395, 404 (1952); *General Electric Company*, 150 NLRB 192, 193 (1964), enfd. 418 F.2d 736 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970). But the right not to agree or concede, or to refuse a particular proposal or make a concession, may not be utilized "as a cloak . . . to conceal a purposeful strategy to make bargaining futile or fail." *N.L.R.B.* v. *Herman Sausage Co., Inc.*, 275 F.2d 229, 232 (5th Cir. 1960).

bargaining be conducted at a specified rate of speed, so long as the pattern does not bespeak bad faith.[28] The fact is that the parties did bargain concerning pensions, within the context of full-spectrum negotiation, between the onset of their negotiations (September 20, 1980) and the commencement of the strike (November 17, 1980), as well as thereafter.[29] While the Union may have been disappointed at its failure speedily to accomplish its objectives concerning pensions (as well as other subjects) during the negotiations which it elected to punctuate (as was its right) with a strike commencing on November 17, 1980, the proof does not establish that Respondent's failure to acquiesce wholly in the Union's pension demands, or that Respondent's rate of bargaining speed on that subject (considered, as it must be, in context with other economically potentially costly subjects)—particularly in view of the Union's failure to advance counterproposals or any modification of its original proposals on that subject[30]—were such as to amount to bad-faith bargaining in violation of the Act.

It is the scheme of the Act that the Board may intrude into private sector collective bargaining only to assure that it occurs. The Board may not even unlock bona fide impasse. However, administration of this basic principle involves a wavy or even spike line, one aspect of which is that—to paraphrase a familiar cliche—bargaining delayed may be bargaining denied. But the facts here hardly meld to display such a pattern.

The fact of the matter is that the parties have been bargaining, in conventional fashion, since as well as before the strike which started on November 17, 1980, with the strike a mere (and lawful) economic-pressure incident in the course of that bargaining. While the fact that bargaining takes place after a strike does not necessarily operate to erase, avoid, or waive any bad-faith bargaining antedating the strike, it being in the public interest to encourage resumption of bargaining even during a strike,[31] nevertheless at the same time it is certain that the mere fact that a strike has been called does not itself establish bad faith by the employer in the bargaining which preceded the strike. Strikes are traditionally (and legitimately) called to exert economic pressure on employers to meet unions' demands on behalf of their constituent employees associated in collective endeavor. Such strikes, known as "economic strikes," are to be sharply differentiated from "unfair labor strikes" which are the consequence of an employer's unfair labor practices in violation of the Act. The consequences of the differentiation between these two different types of strikes have been pointed out so many times that they should be crystal clear to union representatives as well as to employers. Significantly and centrally, *economic* strikers may, while striking or withholding their labor, be replaced by the employer—since the employer has the right to attempt to continue to carry on his business without the strikers, if he can, during a strike, by hiring replacement employees—subject to the employer's obligation to reemploy economic strikers who have not impermissibly misconducted themselves during the strike, as their replacements leave, are discharged, or as suitable jobs otherwise open up; whereas *unfair labor practice* strikers may not lawfully be replaced in their jobs, so that their replacements are required to surrender or be ousted from their jobs in order to return the *unfair labor practice* strikers to those jobs.[32] But, as already stated, here no bad-faith or other unfair labor practice bargaining on the Employer's part has been established. The Employer has bargained in good faith with the Union before, during, and after the strike until the time of the hearing herein. The fact that the Union has not succeeded in attaining its avowed bargaining objectives does not, of course, mean the Employer has been bargaining in bad faith (nor that, for that reason, the ensuing strike was an unfair labor practice strike), since the Employer (no more than the Union) is not required to agree, but only to bargain in good faith.

Nor, specifically with regard to the subject of pensions, does the proof establish bad-faith bargaining by Respondent. It is conceded that Respondent was under no obligation to bargain with the Union on that subject prior to the inception (at the Union's behest, which was acceded to by Respondent without delay) of negotiations on September 30, 1980; and thereafter the parties did in fact bargain thereon in good faith. Respondent was not under obligation to acquiesce in the Union's proposals or to conclude agreement on that important economic subject prior to or other than as part of overall agreement upon an entire economic package, since, as is well known, in the normal peristalsis of collective bargaining each component of an economic package is like a weight placed on or withdrawn from one side or the other of the scale, either weighing it down or lightening it. Thus, an employer (just as a union) may legitimately make, modify by reduction or improvement, or even withdraw a wage offer depending upon how costly (or gainful) are the features of an improved pension plan—or, *vice versa*. This, as is a matter of common knowledge, is of the very essence of the collective-bargaining process.

In short, no failure or refusal to bargain has been established as alleged; nor has any "bad faith" or "surface" bargaining on Respondent's part been demonstrated.[33] Although, to be sure, Respondent's executive and chief negotiator, Stark, indicated at the close of the November 14, 1980, bargaining session that the parties had arrived at "impasse," even if he was right this would, of course,

[28] Cf., e.g., *King Radio Corporation, Inc.*, 172 NLRB 1051 (1968), enfd. 416 F.2d 569 (10th Cir. 1969), cert. denied 397 U.S. 1007 (1970).

[29] It is of course clear that a strike does not toll the statutory bargaining obligation. *N.L.R.B.* v. *J. H. Rutter-Rex Manufacturing Company*, 245 F.2d 594, 596 (5th Cir. 1957).

[30] In connection with the Union's seeming dissatisfaction with the rate of Respondent's negotiating speed on the subject of pensions, it will be recalled that when Respondent submitted its comprehensive proposed new pension to the Union (June 25, 1981—G.C. Exhs. 14A and B), the Union's response to Respondent was that it needed to submit the proposal to its own actuaries, in turn, for study; and that, as of the time of the instant hearing, some 5 months later, Respondent's pension proposal was still under study by the Union's actuaries or under consideration by the Union. Thus, this is hardly a hare versus a tortoise situation.

[31] See fn. 29, *supra*.

[32] See, e.g., *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270, 278 (1956); *The Laidlaw Corporation*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

[33] Indeed, Respondent in its answer accuses the *Union* —not implausibly—of bad-faith bargaining.

not establish violation of the Act, and any ensuing strike (as here) not caused by an unfair labor practice would have to be regarded as a mere economic strike.

Since no unfair labor practice on Respondent's part has been established, the unit employees' strike which they elected to commence on November 17, 1980, was not an unfair labor practice strike and they were not unfair labor practice strikers. When that strike started, not only had Respondent not committed any unfair labor practice under the Act, but the parties were for practical purposes in the throes of bargaining—according to Dahlke, the Union itself was still in the midst of consideration of the Employer's proposed new wage-classification structure and position revision, when it elected to strike; and full-spectrum bargaining continued apace notwithstanding the strike. Upon the Union's own evidence, I find that the strike was purely economic in nature.[34]

The ADEA/ERISA—Mandated Amendments to Respondent's Pension Plan

The further contention was raised at the hearing—but unmentioned in the complaint as amended—that Respondent committed a further unfair labor practice, and that for that additional reason the Union's strike was an unfair labor practice strike, through instituting certain unilateral changes in the pension plan without bargaining with the Union.

This contention centers around changes in Respondent's pension plan mandated by law under 1979 amendments to the Federal Age Discrimination in Employment Act (ADEA) with implementing U.S. Internal Revenue Service and Department of Labor Regulations affecting employer pension plans under the Employees Retirement Security Act, 29 U.S.C. § 1001, *et seq.* (ERISA). The proof establishes that Respondent did indeed make these statutorily required changes (Contract Amendment No. 6) so as to conform its plan to those requirements added in the interest of employee beneficiaries of pension plans (G.C. Exhs. 25–32 incl., finalized on or about October 7, 1980). It is undisputed that these changes were thereafter called to the Union's attention by Respondent on June 30, 1981.

With regard to the foregoing, credited testimony of Company's executive and chief negotiator, Stark, establishes that these "changes" in its pension plan were mandated by Federal statute applicable nationwide to all pension plans; that they were perfunctory in nature; and that at no time did the Union in any way take exception or objection to them (nor could it have, *vis-a-vis* Respondent, who was legally required to comply therewith), nor to any of the earlier similarly mandated amendments 1–5. It is further observed that the parties' subsisting 1977–80 collective agreement explicitly provides that the pension plan is to be conformed to "state and federal laws." Moreover, since this entire matter—innocuous and legally required as it was—was concededly unknown to the Union before June 30, 1981, it can hardly be contended that it played any role in triggering its strike of November 17, 1980; nor is there any showing whatsoever that the preceding strike (since November 17, 1980) was in any way converted into an unfair labor practice strike thereby, retroactively or prospectively. There is simply no causal connection[35] between this statutorily required "Amendment No. 6" and the strike.[36]

[34] The fact that Dahlke used the expression "unfair labor practice" in characterizing Respondent's actions obviously does not establish that the strike was an "unfair labor practice strike." In this connection, it is further to be noted that the strike was authorized by the membership substantially prior to November 17—on November 2, when it could only have had an economic basis without more. And it did not change thereafter, since at no time did Respondent fail or refuse to bargain on any subject.

[35] That causal connection must be demonstrated to establish an unfair labor practice strike, see *Latrobe Steel Company* v. *N.L.R.B.*, 630 F.2d 171, 180–181 (3d Cir. 1980); *Deister Concentrator Company, Inc.*, 253 NLRB 358, 392–394 (1980); *Certified Corporation*, 241 NLRB 369, 373 (1979); *Tufts Brothers Incorporated*, 235 NLRB 808, 810–811 (1978); *Pennco, Inc.*, 212 NLRB 677, 678–679 (1974); *Coca Cola Bottling Works, Inc.*, 186 NLRB 1050, 1053–54 (1970), modified at 466 F.2d 380 (D.C. Cir. 1972); *Peyton Packing Company, Inc.*, 129 NLRB 1275, 1293–94 (1961); *Anchor Rome Mills, Inc.*, 86 NLRB 1120, 1122 (1949). See also cases cited *infra*, fn. 35.

[35] Cf. *Latrobe Steel Co.* v. *N.L.R.B.*, 630 F.2d 171, 180–181 (3d Cir. 1980); *N.L.R.B.* v. *Tomco Communications, Inc.*, 567 F.2d 871 (9th Cir. 1978); *N.L.R.B.* v. *Colonial Haven Nursing Home, Inc.*, 542 F.2d 691, 704–705 (7th Cir. 1976); *Winn-Dixie Stores, Inc.* v. *N.L.R.B.*, 448 F.2d 8, 11–12 (5th Cir. 1971); *Winter Garden Citrus Products Cooperative* v. *N.L.R.B.*, 238 F.2d 128, 129 (5th Cir. 1956); *Tufts Brothers Incorporated*, 235 NLRB 808, 810–811 (1978); *Arkay Packaging Corporation*, 221 NLRB 99, 105–106 (1975); *Pennco, Inc.*, 212 NLRB 677, 678–679 (1974); *Romo Paper Products Corp.*, 208 NLRB 644 (1974); *Typoservice Corporation*, 203 NLRB 1180 (1973); *Capital Rubber & Specialty Co., Inc.*, 198 NLRB 260 (1972); *Peyton Packing Company, Inc.*, 129 NLRB 1275, 1293–94 (1961); *Anchor Rome Mills, Inc.*, 86 NLRB 1120, 1122 (1949). See also cases cited *supra*, fn. 34.

[36] Charging Party urges on brief that "Amendment No. 6" contained or may have contained some changes in the pension plan not mandated by the latest ERISA statutory requirements. But it is to be observed that (1) the precise identification, content, nature, or alleged significance (if any) of any of these was not shown by Charging Party prior to or even at the instant hearing; (2) neither the charge nor the complaint, even as amended, includes any such allegation, nor was it comprehensibly pinpointed or litigated; and (3) in any event, since concededly totally unknown to Charging Party at the time the strike here was called, they could not have been the cause of the strike (*supra*, fns. 34 and 35).

Charging Party's umbrage at not having received immediate technical notification of those changes even before finalized by the plan's insurer/administrator ignores the further fact that the ERISA changes were not in any sense "unilateral" changes made by the employer but were mandated by Congress and therefore hardly subject to the give-and-take of employer-union bargaining. It is finally observed that at the same time Charging Party dabbles suggestively in these murky waters in its brief, it at the same time carefully eschews any "intent here to become involved in an esoteric or exhaustive discussion on ERISA, the Internal Revenue Code, or the Age Discrimination in Employment Act (ADEA)" (C.P. br., p. 41); and later therein (*id.* p. 44), a further argument is predicated on the "assum[ption] *arguendo* that it [i.e., Amendment No. 6 was in its entirety] required by federal law." This type of argument appears to smack of a somewhat slippery approach to the contention of alleged or supposed "substantiality" of nonstatutorily mandated "changes" in "Amendment No. 6," now attempted to be suggested or injected by Charging Party, thrusting it for adjudication without adequate pretrial or in-trial identification as a real issue to be litigated, or factual development at the hearing itself so as to suffice as an adequate predicate for factfinding one way or the other. It is the responsibility of the party who wishes to raise issues in adversary litigation such as this to do so in timely and proper fashion in pleadings (or amended pleadings) and then to litigate them adequately at the hearing by establishing a proper record, as distinguished from "esoteric" (actual or eschewed) suggestions, speculations, and implications on brief, which cannot then properly be dealt with by the trier of fact or a reviewing body. In this posture of the record, it is the Charging Party who, having rested its proof, must assume the responsibility or consequences, if any.

Respondent's Motion To Dismiss

At the conclusion of the General Counsel/Charging Party's case, upon the facts detailed above, Respondent moved to dismiss the complaint.

Since, as has been shown, the proof does not establish that Respondent has failed or refused to bargain with the Charging Party Union in good faith, it follows, as explained above, that the strike commenced by the Charging Party Union on November 17, 1980, was not, and did not thereafter become, an unfair labor practice strike, but was, rather, in its inception and thereafter remained an economic strike. Thus, the allegations of the complaint have not been sustained in any aspect.[37]

The contention that the Adminstrative Law Judge here lacks power to dismiss a complaint at the conclusion of the General Counsel/Charging Party's case is without merit. Nowhere in the Act or in the Anglo-American system of jurisprudence, including administrative law, is there any requirement that a respondent or defendant must "defend" against a "violation" of law that has not been established. Such a requirement would be subject to the gravest constitutional questions. Nor is the contention supported by the Board's practice, which recognizes the propriety of the exercise of such power.[38]

After lengthy hearing and some 2,500 pages of transcript, exhibits, and briefs, under the circumstances shown there is in my opinion no need for economic or other justification for litigating this case further. Since the Act requires no more than that parties bargain in good faith, and not that they arrive at agreement, *prima facie* violation of the Act has not been established, and for that reason the complaint as amended should be dismissed.[39]

Conclusions of Law

1. Jurisdiction is properly asserted here.

2. The General Counsel and Charging Party having rested their proofs, it has not been *prima facie* established

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[37] It is clear that the September 3, 1981, "Admendments to Complaint" add nothing requiring a different result, since in essence they merely allege that Respondent committed a further unfair labor practice by refusing to reinstate the striking employees to their former jobs when they applied for reinstatement on July 28, 1981, on the termination of their strike. Since, however, the striking employees were not unfair labor practice strikers, but only economic strikers, Respondent, as explained above, was not obligated to displace their replacements in order to reinstate the strikers. The allegations of the "Amendments to Complaint" accordingly fall with the complaint.

It was in no way demonstrated at the hearing—nor is it alleged in the "Amendments to Complaint" or otherwise claimed here—that Respondent has refused reinstatement to any striking employee whose job (or otherwise appropriate job) has become available.

[38] See, e.g., NLRB Rules and Regulations, Series 8, as amended, Sec. 102.25 and 102.35(h); Federal Rules of Civil Procedure, 41(b); *Drawo Corporation*, 248 NLRB 620 (1980); *United Automobile Workers, Local 122 (Chrysler Corporation)*, 239 NLRB 1108, 1114 (1978); *Ryder Truck Lines, Inc.*, 234 NLRB 218, 222 (1978); *A.B.C. Florida State Theatres, Inc.*, 221 NLRB 782 (1975); *Bethlehem Steel Corp.*, 197 NLRB 837, 838, fn. 1 (1972); *General Box Company*, 189 NLRB 269, 272 (1971); *Emerson Electric Co.*, 187 NLRB 294 (1970); *Shell Oil Company*, 166 NLRB 1064, 1067, 1079 (1967); *General Maintenance Engineers, Inc.*, 142 NLRB 295 (1963); *United Steelworkers of America, AFL-CIO, and Local Union 2140, etc.*, 129 NLRB 357, 358, 361 (1960), enfd. *sub nom. United States Pipe and Foundry Company* v. *N.L.R.B.*, 298 F.2d 873 (5th Cir. 1962), cert. denied 370 U.S. 919 (1962); *Cherry Rivet Company*, 97 NLRB 1303, 1304, fn. 1 (1952):

> At the close of the General Counsel's presentation of evidence, the Trial Examiner, upon motion of the Respondent, dismissed certain allegations of the complaint on the ground that no *prima facie* case had been established as to those allegations. The General Counsel and the Union excepted to this ruling on the grounds that a *prima facie* case had been made out, and that the Trial Examiner had no power to dismiss any portion of the complaint before both sides had presented their evidence. We disagree with these contentions. The evidence introduced by the General Counsel to support the allegations in question was speculative and inconclusive, and would not have supported a finding that the Act had been violated. *Furthermore, we find nothing in either the Administrative Procedure Act or our own Rules and Regulations which prevents the Trial Examiner from dismissing a complaint under such circumstances. Such dismissals are well established judicial and administrative practice, and are in the interest of speedy administration of the law.* [*Cherry Rivet, supra*, 1304, fn. 1; emphasis supplied.]

That the power of the Administrative Law Judge under Federal practice to dismiss at the end of the plaintiff's/prosecutor's case heard without a jury may even involve determination of issues of credibility where appropriate, see NLRB Rules and Regulations, Series 8, as amended, Sec. 102.39; *Bunker Ramo Corporation*, JD-572-80, p. 8, fn. 8 (Sept. 12, 1980); *United Automobile Workers, Local 122 (Chrysler Corp.)*, 239 NLRB 1108, 1112 (1978); *Cherry Rivet Company*, 97 NLRB 1303, 1304, fn. 1 (1952); *Sime* v. *Trustees of the California State University and Colleges*, 526 F.2d 1112 (9th Cir. 1975); *Island Service, Company, Inc.* v. *Perez*, 309 F.2d 799 (9th Cir. 1962); *Poverman* v. *Walnut Hill Plaza, Inc.*, 261 F.Supp. 176, 180 (D.R.I. 1966); *United States* v. *Huck Manufacturing Company*, 227 F.Supp. 791, 805 (E.D. Mich. 1964), affd. 382 U.S. 197 (1965); Notes, Advisory Committee on Rules, to 1946 Amendments to Federal Rules of Civil Procedure 41(b); 5 *Moore's Federal Practice*, par. 41-133 at 41-188. The foregoing is in contrast to the standard applicable on a motion for summary judgment, where the facts are to be viewed in the light most favorable to the opposing party; see *Southwest Louisiana Hospital Association d/b/a Lake Charles Hospital*, 240 NLRB 1330, 1330-31, fn. 4 (1979). But cf. *Pennypower Shopping News, Inc.*, 244 NLRB 536 (1979).

[39] In its September 4, 1981, "Answer to [September 3, 1981] Amendments to Complaint," Respondent raises the "Additional Affirmative Defense" that contrary to the allegations of those "Amendments to Complaint," "no unconditional offer to return to work" has been made on behalf of the striking employees since July 27, 1981. Inasmuch as I have recommended dismissal of the complaint as amended, it would appear that it is unnecessary to deal with this affirmative defense herein. It appears from colloquy at the hearing that the affirmative defense centers around the consumers' boycott (referred to above) promoted by the Union, which has apparently been maintained notwithstanding the alleged "unconditional" offer to return to work—Respondent contending that the offer was not unconditional since it involved continued promotion, maintenance, and advocacy by the unit employees of the consumers' boycott against Respondent, their own employer, such a boycott being inconsistent with, at any rate, the characteristics of their previous employment relationship as sought to be resumed, if not with the normal incidents of an employer-employee relationship. Cf., e.g., *Sunbeam Corporation*, 184 NLRB 950 (1970), affd. *sub nom. Moore* v. *Sunbeam Corp.*, 79 LRRM 2803 (7th Cir. 1972). The General Counsel/Charging Party argue, on the other hand, that conditioning reinstatement upon the abandonment of the consumers' boycott would be invasive of first admendment rights as well as violative of the Act. Cf., e.g., *M Restaurants, Incorporated d/b/a The Mandarin*, 223 NLRB 725 (1976); *Sears, Roebuck & Co.*, 168 NLRB 955 (1967); *Edir, Inc. d/b/a Wolfie's*, 159 NLRB 686 (1966).

In the existing posture and in view of the outcome here, I do not think this issue need or should be resolved at this time, not only because the complaint as amended is being dismissed, but also because the "Amendments to Complaint" do not allege that any *economic* striker entitled to reinstatement (if his job or other suitable employment opens up) has been unlawfully denied reinstatement, and, finally, because no such proof was here presented. For these reasons, it would appear that the contention involved in Respondent's said affirmative defense is moot here. This leaves open the possibility that it may have to be dealt with if interposed in any other or future Board case alleging that an economic striker properly seeking reinstatement has been refused because of participation in or maintenance of the consumers' boycott or on other allegedly invalid basis.

that Respondent has violated Section 8(a)(5), (1), or (3) of the Act, as alleged in the complaint dated July 23, as amended on September 3, 1981, or in any other respect.

3. Credited proof fails to establish that Respondent has violated the Act in any respect alleged or otherwise.

4. Upon the facts and the law the General Counsel and the Charging Party have shown no right to relief herein.

5. Respondent's motion, at the conclusion of the General Counsel/Charging Party's case, to dismiss said complaint as amended should be granted.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

ORDER[40]

It is hereby ordered that the complaint herein, dated July 23 as amended September 3, 1981, be and it is hereby dismissed.

[40] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.